Nos. 15225-15226

United States Court of Appeals
For the Ninth Circuit

CHARLES S. THOMAS, Assistant Secretary of Defense for the Navy, *et al., Appellants,*

vs.

UNITED STATES OF AMERICA on the Relation of Peter J. Smith, *Appellee.*

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy; CAPT. J. J. GREYTAK, U. S. Navy, *et al., Appellants,*

vs.

UNITED STATES, ex rel. LOUIS V. BOSCOLA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEES

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THE ARGUS PRESS, SEATTLE

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

As appellants point out in their brief, both appellees, Boscola and Smith, were at the time of their recall to active duty on January 31, 1956, retired enlisted men from the United States Navy. Each had served more than 30 years in the armed forces. Boscola, after his retirement, and Smith, before his retirement but while on inactive duty, each committed crimes in the State of Washington. Each pleaded guilty and was sentenced according to law. Smith's 30 years in the Navy expired

after his incarceration in the State Penitentiary, and he was retired from the Navy while serving his sentence. Both men were paroled in January, 1956, and were recalled to active duty by the U.S. Navy for the avowed purpose of court-martialing them for the same crimes for which they had been tried, convicted and served their sentences. Both Smith and Boscola filed Petitions for Writs of Habeas Corpus, alleging that their recall to active duty was unlawful and that they, as retired enlisted men, were not subject to court-martial for crimes committeed subsequent to retirement and in no way connected with naval duty. The cases were consolidated for hearing. After a full hearing, the court found in its memorandum decision:

> "Can it be contended in good faith that awaiting trial by court-martial or making application for undesirable discharge because of an offense committed years after separation from active service and unrelated to the naval forces, activity or business, was a type or category of duty, contemplated by Congress when the Secretary of Navy was authorized in time of war or national emergency to recall retired enlisted men into active service for such duty as they might be able to perform. The court believes not." (Tr.32)
>
> " . . . the Navy may not lawfully order or recall an enlisted man on the retired list to active duty under a statute clearly anticipating a recall for the performance of further duty as a guise for an unrelated purpose, namely, for the avowed and only purpose of obtaining his consent to an undesirable discharge wholly and completely from further duty or in the alternative to subject him to court-martial, presumably with the same objective." (Tr. 35)

ARGUMENT ON APPELLANTS' BRIEF

Appellees at the outset call the court's attention to the failure of appellants to comply with Rule 18(d) of Rules of the United States Court of Appeals for the Ninth Circuit. Appellants, in their brief, pages 3 and 4, under Questions on Appeal, urge error in the admission of evidence at the trial and have failed to quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected. Thus, although appellants urge that the District Court had no right to take evidence on the purpose for which appellees were recalled to active duty, there is nothing in the transcript of the proceedings to show that any objection whatever was made to the admission of Exhibit 4 (Tr. 56-58), Exhibit 5 (Tr. 58-60), or Exhibit 2 (Tr. 60-63). The purpose of the recall is a matter of stipulation (Tr. 52).

Appellants have further failed to comply with Rule 18(d) of Rules of the United States Court of Appeals for the Ninth Circuit by their failure to take any specification of error to the Findings of Fact and Conclusions of Law made by the court in regard to each of the appellees (Tr. 36-39 and 41-45).

In the *Boscola* case, the court made and entered Finding of Fact IV:

> "That the written stipulation of facts and copies of letter orders to active duty attached thereto, as well as the testimony of petitioner and other exhibits admitted into evidence, show that petitioner was not recalled into active duty in the Navy for any particular duty, and that no duty has been assigned to petitioner since his recall to active duty. That the evidence establishes that petitioner Bos-

> cola was recalled ostensibly for active duty, but in reality for no duty, and actually to accomplish an undesirable discharge." (Tr. 38)

and made substantially the same Finding in the Smith case (Tr. 44, Finding of Fact III), both based upon testimony, evidence and stipulations of counsel. These Findings are now conclusive on appeal upon appellants' failure to particularly state the error relied upon in appellants' specification of errors.

For the reasons stated above, based upon appellants' failure to comply with Rule 18(d) of this court, no consideration should be given to appellants' Questions on Appeal I, appellants' brief, page 3.

ANSWER TO APPELLANTS' ARGUMENT

Appellants' principal argument on appeal appears to be that, based upon *Dakota Telephone Co. v. South Dakota,* 250 U.S. 163, 63 L.ed. 910, 39 S.Ct. 507, the District Court was foreclosed from making any ruling whatever as to whether appellees had or had not been unlawfully recalled to active duty.

It may be stated as a maxim on appeals that propositions not raised in the trial court nor brought to its attention can not be raised for the first time on appeal. *Becker Steel Co. of America,* 296 U.S. 74, 56 S.Ct. 15; *Duigman v. U. S.,* 247 U.S. 195, 47 S.Ct. 566, 71 L.ed. 996. See 4 C.J.S., Appeal and Error, §228, page 430, and cases cited thereunder.

Appellants' contention that appellees' recall to active duty was a matter of administrative discretion and not subject to judicial review was never at any stage of the proceedings presented to the trial court and has been

raised for the first time in appellant's brief. There is no reviewable issue before this court, and the judgment of the District Court should be affirmed.

Appellants have taken the further side position that the trial court, having no power of judicial review in respect to appellees' recall to active duty, erred in admitting evidence as to the purpose for which appellees were so recalled. As stated earlier in this brief wherein appellants' failure to comply with Rule 18(d) is discussed, no objection to the admission of any such evidence is shown in the record. To preserve questions for review on appeal, objections must be made in the trial court. *Solomon v. Benjamin,* 75 F.(2d) 564, cert. denied 295 U.S. 749, 55 S.Ct. 831, 79 L.ed. 1694. Thus, having failed to take timely and proper objection to the admission of evidence as to the purpose of appellees' recall to duty, appellants now, for the first time, contend that the trial court erred in admitting such evidence upon the specific ground that the trial court had no power of judicial review of the administrative action of the Secretary of the Navy.

The only objection to the introduction of any evidence shown in the transcript is Mr. McCormick's objection to the admission of his oral stipulation (that the purpose of recalling appellees to active duty was for the purpose of court-martial) and his exception thereto (Tr. 52). This stipulation and objection was taken April 13, 1956 (Tr. 51), by which time all of the appellees' exhibits had been admitted as of April 12, 1956 (Tr. 53-63). No objection of appellants to the admission of these exhibits is shown in the record on appeal.

Turning, however, to the merits of appellants' arguments, it is appellees' contention that none of the cases cited by appellants in support of their contentions is factually or legally in point. The *Dakota* case, *supra,* was a case involving the power of the President of the United States to take over certain communications systems under a Joint Resolution (40 Stat. 904, C. 154), and as stated by appellant, the Supreme Court, in ruling upon whether the power had been validly exercised, stated that the action of the President was not subject to judicial review.

Thus, the case is one involving the war powers of the President in taking over and exercising control of a communications system, and is concerned in no way with the present case either factually or legally. It will be observed that the *Dakota* case is not a habeas corpus proceeding and in no way involved the personal liberty and restraint upon the person involved in the case at bar. There is a vast difference (politically as well as legally) between the *Dakota* case and the present case, which involves the recall of two retired enlisted men to active duty, during a time of limited National Emergency, for a purpose connected in no way with that National Emergency.

Appellants also cite *U. S. ex rel. Pasela v. Fenno,* 167 F.(2d) 593, as supporting their contention that appellees' recall to duty was legal. It is respectfully pointed out, however, that that case involved a member of the Fleet Reserve who had been convicted by court-martial of theft of military property while a civilian employee of the Navy Department. The Court of Appeals

for the Second Circuit found that the petitioner was subject to court-martial as a member of the Fleet Reserve on inactive duty, and refused to grant a writ. The court then went on to say *by way of dictum* that petitioner's recall to active duty for the purpose of court-martial had been proper. This, however, was by then a moot question, since the fact of being or not being on active duty at the time of court-martial was immaterial to the court-martial jurisdiction of the Navy under the applicable law.

Denby v. Berry, 263 U.S. 29, 44 S.Ct. 74, 68 L.ed. 148, cited by appellants in support of their contention that no judicial review can be had of a discretionary administrative act, is likewise not in point. There, the question involved was in regard to the ordering of a Naval Reserve Officer to inactive status and the court stated:

> "It is quite evident from the foregoing that members of this [Naval Reserve] force occupied two statuses, one that of inactive duty and the other of active service. . . . "

The court then went on to say that the Secretary of the Navy had the power to transfer from one status to another and no judicial review of such action was possible.

The case at bar, however, involves two *retired enlisted men,* who were not merely on inactive duty. There is a vast difference between changing from an active to an inactive duty status within the active reserve and changing from a retired status to active duty.

Appellants make much of their contention that the District Court and appellees are impeaching the "mo-

tives'' of the Navy in this action. Appellees are not interested, nor was the trial court, in the Navy's motives but rather in the *purpose* for which the recall to active duty was had. This aspect of the case will be developed more fully later in this brief.

Although the appellants have cited the *Pasela* case, *supra,* as authority for the proposition that recall to active duty for purposes of court-martial is permissible, appellants have failed to cite *U. S. v. Warden or Keeper of Naval Prison,* 265 Fed. 787. The question there presented, as stated by the court, was:

> "Can an enlisted man in the United States Naval Reserve Forces be tried by a Navy court-martial for an offense alleged to have been committed while in active service, and be amenable to court-martial after he has been released from actual service and entered civil life; no charges or specifications having been preferred against him prior to his release from active service?"

The court, after answering this question in the negative, further states:

> "The United States Naval authorities had no jurisdiction over the relator, and he can only be recalled into the service in accordance with the rules and regulations of the Navy, and not for the purpose of giving the Navy court-martial jurisdiction."

See also: *U. S. v. MacDonald,* 265 Fed. 695.

No purpose would be served in this brief by dealing in detail with cases cited by appellants defining "duty," "service," and "active duty," although attention is called to Winthrop, Military Law and Precedents, 1920, page 614, cited by appellants in their brief at page 19,

which states, "What is military duty. The term 'duty' . . . means, of course, *military duty* . . . " Thus appellants in this phase of their argument apparently urge the court that court-martial is a duty, and that recall for such purpose is proper. Appellees feel that this entire line of appellants' argument based upon what appellees did or did not do after recall to active duty, has no bearing on whether the recall itself was lawful. Appellants' position is that petitioners were lawfully recalled to active duty, since after their *arrest,* they were subject to military orders and therefore on duty. This "duty," of course, consisted of (1) attempted coercion of appellees to sign requests for undesirable discharge (Tr. 57-58) and (2) restriction to barracks awaiting court-martial (Tr. 44). Thus, appellants contend appellees were lawfully recalled to active duty because *after* recall, they performed "duty" of a sort.

The question involved is whether the recall to active duty was lawful *at the time it was effected.*

ARGUMENT IN SUPPORT OF THE JUDGMENT

At the outset we point out to the court that there are no rules of *stare decisis* governing the case here on appeal, involving, as it does, the power of the Navy to recall *retired enlisted men* to active duty solely for purposes of court-martial. There are no decisions on the question and it is before the court as a case of first impression, and must be decided upon application of basic legal principles to the statute involved, rather than upon settled case law.

Appellees feel, as did the trial court, that the language of 34 U.S.C.A. §433,

> "The Secretary of the Navy is authorized in time of war, or when a National Emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform . . . "

must be given a common sense meaning, and effect should be given to every word therein. It seems obvious to appellees that Congress, in passing this law, meant to give the Secretary of the Navy authority to recall retired enlisted men into active duty to perform such services as able *in support of the war or emergency effort.* Clearly, the decision as to what duty is in aid of the National Emergency is an administrative one, not a judicial one. Here, however, it affirmatively appears that the recall was for no duty related to the emergency.

Appellees feel it can reasonably be assumed that retired men were not to be recalled for a purpose totally unconnected with any military effort. It is fundamental that the Navy's only function is a military one, and that any man called into active service can reasonably be expected to be on duty for that purpose. However, it is uncontradicted, and was stipulated, that the sole reason for recalling appellees to active duty was for a purpose totally unrelated to any military effort, *i.e.,* for the sole purpose of standing for court-martial.

Although the question is not directly in point on this appeal, the trial court not having reached the exact issue, it should be pointed out that the appellants' recalling of appellees for the sole purpose of court-martial raises the issue as to whether the Navy has court-martial jurisdiction of appellees. There is a very serious question as to whether or not appellees are subject to

court-martial, and that being the case, it has definite bearing on the question of their recall to active duty.

The Navy contended, and apparently still contends, that it has court-martial jurisdiction of appellees under the provisions of Article 2(4), Uniform Code of Military Justice, 50 U.S.C.A. §552(4), which states, in that portion of the statute relative to the case on appeal, as follows:

> "The following persons are subject to this chapter . . .
>
> "(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay; . . ."

At first glance there would seem to be no doubt that appellees are subject to the code, and therefore amenable to court-martial. However, a closer examination of the statute and its legislative history leads to the inevitable conclusion that the quoted section applies only to retired *officers*. There is no distinction in the statute itself of the terms "retired personnel" or of "regular component."

The legislative history of the Uniform Code of Military Justice, Article 2(4), reveals that it was not the legislative intent to bring retired *enlisted* men under the provisions of that section. In examining the legislative history, we find that Mr. Robert W. Smith, professional staff member of Sub-Committee No. 1 of the House Committee on Armed Forces stated to that Sub-Committee:

> "Paragraphs (4) and (5) have their sources in 10 U.S.C., Section 1023, and 34 U.S.C., Sections

389 and 853 d. The power of the Navy over retired reserves has been reduced."

An examination of the indicated sections of the United States Code reveals that 10 U.S.C. §1023 pertains to rights and liabilities of retired *officers.* 34 U.S.C. §389 refers to the grades and status of retired *officers;* and 34 U.S.C. §853-d refers to reserves and fleet reserves, but does not pertain to *retired* members of the fleet reserve or to retired *regulars.* Thus, it is clear that Article 2(4), U.C.M.J., was based upon pre-existing legislation referring solely to officers and that the Sub-Committee had no intention to include retired enlisted men within the purview of the article. This appears even more clearly when the colloquy which took place between Mr. Brooks, Chairman of the Sub-Committee, and Mr. Felix Larkin, Assistant General Counsel of the Secretary of Defense, who assisted in drafting the Uniform Code, is examined. That colloquy is as follows:

"Mr. Brooks: Colonel Maas suggested that subsection 4, as I recall, was wrong.

"Mr. Larkin: I recall that Mr. Chairman. That is a provision we have not changed by modification; extension or by diminishing it in any way from the present law that has been on the books for I don't know how many years.

"It covers, of course, the retired personnel of the regular components, the *officers* who are in a retired status and still considered to be officers of the United States or the Armed Forces." House Hearing, page 864. (Emphasis added)

Mr. Larkin also stated in regard to Article 2(4) U.C.M.J.:

"As I say, that is the first time I had heard a criticism of that article which as far as we are concerned, is a pure reincorporation of what has been on the books for many years." House Hearing, pages 864, 865.

At the time Mr. Larkin was speaking, retired *enlisted* personnel were not subject to the jurisdiction of either the Articles of War or the Articles for the Government of the Navy. In this regard see:

Murphy v. U. S., 38 Ct. Cls. 511, and 39 Ct. Cls. 178;

Court-Martial Orders, 9, 1922, 11;

Court-Martial Orders, 60, 1920, 22;

16 Op. J.A.G. 136, File 7657-123, Dec. 29, 1911.

In *Deming v. McClaughy,* 113 Fed. Cas. 639, Judge Sanborn of the Circuit Court of Appeals of the Eighth Circuit stated:

"The legal presumption is that courts of general jurisdiction have the power and authority to make the adjudications which they render, and that their judgments are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that this jurisdiction shall be clearly and unequivocally shown. A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporal judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it."

It has often been said that courts-martial,

" . . . are in fact simply instrumentalities of the executive power, provided by Congress for the

president as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein." Winthrop, *Military Law and Precedents,* 1920 reprint, page 49, and that

" . . . trial of soldiers to maintain discipline is merely incidental to an Army's primary fighting function." *U. S. ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, 100 L.ed. 8.

The court should inquire whether Congress, in enacting Article 2(4), U.C.M.J., considered that the discipline of the armed forces as a fighting force required the granting of jurisdiction over retired enlisted personnel *not on active duty.* Retired enlisted personnel owe no more service to the Navy than do members of the ready reserve (who by Art. 2(3), U.C.M.J., are not subject to the act except voluntarily) or retired members of the reserve (who by Art. 2(5), U.C.M.J., are subject to the act only when hospitalized). If the pre-existing law was not to be extended by Article 2(4), then the drafters of the code obviously had no intention of making it applicable to retired enlisted personnel. The Armed Forces representative, Mr. Felix Larkin, as much as said so when he referred (*supra*) to the "retired personnel of the regular components, the officers . . . "

The Congressional Committee was given to understand Article 2(4) was expressive of the existing law. It is clear that the House Sub-Committee understood such to be the meaning since Mr. Brooks, Chairman, said with reference thereto:

" . . . and furthermore, it is part of the present law, is it not, and has worked all right, has it not?

Then if there is no objection, we would like to include that." Legs. History, p. 1262, see also p. 1261.

Likewise, both the House and Senate Committee Reports state that:

"Paragraph (4) retains existing jurisdiction over retired personnel of a regular component who are entitled to receive pay." House Report, p. 10, Senate Report, p. 7.

Appellees point out tothe court that 10 U.S.C.A. 1023 (referring to retired Army officers) specifically states that such retired officers shall be subject to trial by courts-martial.

"Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof." 10 U.S.C.A. §1023.

Appellees point out to the court that 10 U.S.C.A. 1023 1951, 34 U.S.C.A. §389 (referring to retired Navy Officers) provided:

"Except as otherwise provided in this title, officers retired from active service shall be placed on the retired list of officers of the grades to which they belonged respectively at the time of their retirement, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court martial. The names of officers wholly retired from the service shall be omitted from the Navy Register."

At the time of the passage of the U.C.M.J., on May 5,

1950, the above section was amended by striking therefrom the words "and shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial," which indicates that Congress considered those words superfluous in view of the considered meaning of Article 2(4).

Thus, for the above reasons, it is appellees' contention that Article 2(4), insofar as the Navy seeks to make it applicable to retired *enlisted* personnel, is an attempt at an unwarranted and unnecessary extension of military power. The position of the Navy and military authorities in this respect is particularly reprehensible in that, having led the Congressional Committees to believe enlisted men were not included within the provisions of Article 2(4), and having allayed the fears and circumvented the opposition which would most naturally arise to such an unwarranted extension of military jurisdiction, the Navy must now contend that the article clearly includes retired enlisted men.

Thus it appears to appellees that from the foregoing that the Navy has no jurisdiction to effectuate its avowed purpose in recalling the appellees to active duty, and that the appellants are in the position of recalling appellees for the obvious reason that the Navy feels that having appellees on active duty is in aid of jurisdiction, in that there being a serious issue as to the court-martial jurisdiction, that obtaining jurisdiction of the persons of appellees bolsters the jurisdiction in court-martial.

Apparently, appellants make no contention that court-martial itself is within the meaning of "active

service," although, as has been pointed out previously in this brief, appellants contend that awaiting court-martial is "active duty." Appellees fully expect, however, that appellants will, in argument and their reply brief, urge that the court-martial of appellees bears some reasonable relation to the maintenance of good order and discipline in the Navy. This contention was dealt with in the recent Supreme Court decision of *U. S. ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, 100 L.ed. 8. Justice Black, speaking for the court, stated:

> "We find nothing in the history or constitutional treatment of a military tribunal which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be

removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

It is seen that the Supreme Court placed great emphasis on the the function of the military as being primarily a fighting unit and only secondarily a tryer of cases. The court then further states:

"It is impossible to think that the discipline of the army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians. And we are not impressed by the fact that some other countries which do not have our Bill of Rights indulge in the practice of subjecting civilians who were once soldiers to trials by courts-martial instead of trials by civilian courts.

"There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our constitution. Free countries of the world have tried to restrict military tribunals to *the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.* . . . Consequently considerations of discipline provide no excuse for new *expansion* of court-martial jurisdiction at the expense of the normal and constitutionally preferred system of trial by jury. (Emphasis added)

"Determining the scope of the constitutional power of Congress to authorize trial by court-mar-

tial presents another instance calling for limitation to *'the least possible power adequate to the end proposed.'* "

Observe that in the *Toth* case, the court concerns itself with whether Toth should be tried in a civilian or a military court. Boscola and Smith have already been tried, convicted, sentenced, and served their terms in the penitentiary for the offenses committed. Appellants seek to now try them again in the name of "National Emergency."

Appellees contend that the Navy has no jurisdiction to accomplish its purpose of subjecting appellees to court-martial under U.C.M.J., Article 2(4), in that it does not apply to retired *enlisted* men, and that if the court should find that Article 2(4) does apply to retired enlisted men, that it should be declared unconstitutional under Article III, Sec. 2 of the United States Constitution and under the 5th and 6th Amendments thereto.

CONCLUSION

In conclusion, appellees reiterate that the action of appellants constitute an unwarranted and unnecessary attempt to extend the court-martial power of the military, and that the Navy's recall of appellees to active duty for the admitted purpose of subjecting them again to trial for an offense for which they have already been punished is not within the powers granted to the Secretary of the Navy. The reason for appellees' recall to duty lay not in aid of any National Emergency, but in aid of jurisdiction, and in an attempt to strengthen the Navy's jurisdiction by having appellees on active duty at the time of court-martial.

That from the legislative history of Article 2(4) U.C.M.J., it appears without question that appellees, as retired enlisted men, are not subject to court-martial, and that not only was the recall to active duty unlawful, but also the stated purpose was likewise unlawful.

That because of appellants' failure to comply with the rules of this court on appeal, there is no reviewable issue before the court, and the judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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Kenneth P. Short
Attorneys for Appellees.